

7 Official Opinions of the Compliance Board 64 (2010)

Public Body – Generally – Effective October 1, 2009, definition expanded to include entities appointed by official subject to policy direction of independent body appointed by Governor and within the Executive Branch of State Government

Minutes – Public meeting governed by Act – Redaction inappropriate

Compliance Board – Response to complaint – Failure to address allegation violated Act

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Kent County News

The Open Meetings Compliance Board has considered your complaint that the Maryland Transportation Authority (“MDTA”) violated the Open Meetings Act by failing to provide the full text of minutes of meetings of two groups established to advise the MDTA – the Bay Bridge Reconstruction Advisory Group (“BBRAG”) and the Bay Bridge Peer Review Group. The complaint also alleged that, to your knowledge, the Peer Review Group never provided public notice or kept minutes of its meetings.

For the reasons explained below, we find that the redacted minutes of the BBRAG did not violate the Open Meetings Act because, at the time the meetings occurred, it was not a public body subject to the Act. We express no opinion as to whether the Peer Review Group complied with the Act; however, we find that the response failed to adequately address this part of the complaint.

I

Complaint and Response

Your complaint addressed access to minutes of Bay Bridge Reconstruction Advisory Group meetings. We understand that you made a Public Information Act request for minutes in December 2009. Four months later, you received copies of minutes for public meetings, but certain information in the documents had been redacted. Based on attachments included with your

complaint, the meetings at issue were held March 5, 2008, September 3, 2008, October 1, 2008, and March 4, 2009. As we understand the facts, redactions were made in each set of minutes by the former Executive Secretary of the MDTA based on his view that the redacted information was protected by executive privilege – a position you labeled as “spurious.” The complaint noted that if particular matters were “discussed in open session, [agency personnel] can’t go back and redact the minutes.” Based on your subsequent email message, we understand that MDTA later released the minutes to you without the redactions because the information was determined to be less sensitive with the passing of time. However, you made clear that you wanted to pursue the complaint.

Your complaint also addressed your efforts to get minutes for meetings of the Bay Bridge Peer Review Group. You indicated that the MDTA first demanded that you submit a Public Information Act request and then refused to indicate whether minutes exist. According to your complaint, “[a]pparently a complaint is necessary ... to determine if the ‘Peer Review Group’ is in fact a public body.” Included with the complaint were two press releases, one from the Governor’s Office indicating that the Governor had directed the then-Secretary of Transportation to establish a peer review group to examine MDTA’s bridge and tunnel inspection program, and one from Secretary of Transportation Beverly Swaim-Staley announcing that the panel had completed its work. Your complaint included an added note indicating your belief that the Peer Review Group did not advertise its meetings and did not prepare or approve minutes of its meetings.

In a timely response on behalf of both entities, Assistant Attorney General Sherita Harrison explained the reasons why certain information was redacted from the minutes of BBRAG meetings. The response also noted that, on September 8, 2010, unredacted copies were provided to the complainant when the Acting Executive Secretary determined that “the passage of time and subsequent events reduced the sensitive nature and need for confidentiality of the information that was previously redacted.”

Citing 7 *OMCB Opinions* 30 (2010), the response argued that the issue raised in the complaint, namely the complainant’s request for copies of minutes, is governed by the Public Information Act rather than the Open Meetings Act. Thus, in the respondent’s view, the Compliance Board lacks jurisdiction to consider matters raised in the complaint. As to the BBRAG, the response indicated that the entity was informally created by the Executive Secretary of the MDTA. Thus, before October 1, 2009, when the definition of “public body” under the Open Meetings Act was expanded, the BBRAG was not a “public body” governed by the Act. The minutes at issue involved

meetings held before that date. Thus, access to minutes was governed by the Public Information Act rather than the Open Meetings Act.

As to the Peer Review Group, the response argued that the complaint failed to establish “any breach of any provision or duty ... under the [Open Meetings] Act.” Further, the response noted that the Peer Review Group is now defunct. Citing 4 *OMCB Opinions* 111, 112 (2004), the response argued that, “[a] defunct entity ... is not subject to an Open Meetings Act complaint.”

II

Analysis

A. Access to Minutes - In General

As a preliminary matter, we want to clarify our recent opinion addressing access to copies of minutes of public meetings governed by the Open Meetings Act, 7 *OMCB Opinions* 30 (2010). In that opinion, involving the same complainant and the MDTA, we recognized that any person has a right to visit the office of a public body to inspect approved minutes of an open meeting and written closing statements under the Act. 7 *OMCB Opinions* at 33. We also held that the right to copies of minutes is governed by the Public Information Act rather than the Open Meetings Act. (We recognized an exception for written closing statements - a document that generally consists of one or two pages.) 7 *OMCB Opinions* at 34. We have also held that a person should not need to submit a written request to obtain copies of written minutes. 5 *OMCB Opinions* 14, 16 (2006). In issuing the 2010 opinion referring to the Public Information Act, our underlying concern was that the agency should not have to subsidize an extensive volume of copying when a significant volume of minutes were requested, a situation where the agency could have recouped the reasonable costs of such copying had the request been governed by the Public Information Act. We also recognized that the decision to provide copies in paper form or electronically is a decision for the record custodian with advice of its counsel. *Id.*

But we did not hold that the content of minutes of public meetings governed by the Open Meetings Act was subject to redaction under the Public Information Act. We can only construe the Open Meetings Act. But we note that provisions governing access to records under the Public Information Act defer to other law. *See, generally*, Office of the Attorney General, *Maryland Public Information Act Manual* ch. 3 (11th ed. 2008). In this instance, the Open Meetings Act provides that minutes of open meetings are accessible to the public. §10-509(d). Stated otherwise, a copy of the document provided to

a requester should look no different than had the requester visited the office of the public body where the requester would be entitled to review approved minutes of open meetings at any time during ordinary business hours. If a matter was discussed in an open session governed by the Open Meetings Act – even if the meeting could have been closed under §10-508(a),¹ but the public body did not elect to do so – the minutes of that meeting are available to the public. A privilege cannot be applied after the fact.

B. BBRAC

The question remains whether the minutes of the meetings at issue were governed by the Open Meetings Act. According to the response, the BBRAG was informally created by a former Executive Secretary of the MDTA in 2005. If the BBRAG was not a public body at the time of the meetings were held, access to the minutes would not be governed by the Open Meetings Act. The requirements of the Act pertaining to minutes are limited to meetings of a “public body” as that term is defined for purposes of the Act. §§10-502(h); 10-509. As the response correctly pointed out, the definition of “public body” was expanded effective October 1, 2009. But before that date, BBRAG was not a public body under §10-502(h) in that it was not created by any instrument identified in §10-502(h)(1), nor was it apparently established by the MDTA or an official subject to the policy direction of the Governor. The Executive Secretary is accountable to the MDTA, an independent agency. The Executive Secretary is not subject to the policy direction of the Governor. As a result, the BBRAG was not, at that time, a “public body,” and the minutes of the meetings at issue would not have been regulated by the Open Meetings Act.²

C. Peer Review Group

The response failed to address your comment raising questions as to whether the Peer Review Group provided notice or kept minutes of its meetings. Citing 4 *OMCB Opinions* 111 (2004), the response simply argued

¹ All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

² As the response correctly points out, the definition of “public body” was expanded by Chapter 164, Laws of Maryland 2009, effective October 1, 2009. Under the 2009 legislation, the definition of public body was extended to include a multi-member entity “appointed by ... an entity in the Executive Branch ... the members of which are appointed by the Governor, and that otherwise meets the definition of a public body ... or [by] an official who is subject to the policy direction of [such] an entity...” This expansion would likely extend to the BBRAG.

that a defunct entity was not subject to the Compliance Board's complaint process. The response ignored subsequent amendments to the Open Meetings Act designed to address that very situation. *See* Chapter 643, Laws of Maryland 2007. Under the 2007 amendments, when an entity identified in the complaint no longer exists, a complaint is to be sent to the official or entity that appointed the public body. To the extent feasible, that official or entity is to produce a response. §10-502.5(c)(3).

Based on the press releases included with the complaint, the Governor directed the then-Secretary of Transportation to establish the Peer Review Group. The Secretary also serves as chair of the MDTA. In our view, the MDTA was the most appropriate entity to respond to a complaint concerning the Peer Review Group. Because of the limited record as to the Peer Review Group, we decline to rule on whether this entity satisfied the provisions concerning notice and minutes or whether the Peer Review Group was even a public body whose meetings were subject to the Act. §10-502.5(f)(2). We do find that the response failed to satisfy §10-502.5(c)(3).

III

Conclusion

In summary, we find that no violation of the Open Meetings Act occurred when portions of minutes were redacted because, at the time the meetings occurred, the BBAG was not a public body subject to the Open Meetings Act. As to the Peer Review Group, we are unable to address the allegations in the complaint based on the limited record. However, we find that the response failed to satisfy §10-502.5(c)(3).

OPEN MEETINGS COMPLIANCE BOARD

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